STATE OF MICHIGAN

COURT OF APPEALS

ADAM ANDERSON and KATHLEEN ANDERSON, Plaintiffs-Appellants/Cross-Appellees,	UNPUBLISHED March 23, 2010
v	No. 289952 Oakland Circuit Court
SADDLE CREEK APARTMENTS, LLC, BEZTAK MANAGEMENT COMPANY, INC., and SADDLE CREEK ASSOCIATES, LP, Defendants-Appellees/Cross-Appellants.	LC No. 2006-079473-NZ

Before: BORRELLO, P.J., and MARKEY and STEPHENS, JJ.

PER CURIAM.

In this slip-and-fall case, plaintiff[1] appeals as of right the trial court's order granting summary disposition to defendants and dismissing plaintiff's cause of action against defendants with prejudice. Defendants cross-appeal the trial court's denial of their motions in limine to preclude the introduction of certain evidence at trial. For the reasons stated in this opinion, we affirm.

I. FACTS AND PROCEDURAL HISTORY

In December 2005, plaintiff and his wife were living in a second-floor apartment at Saddle Creek Apartments in Novi, Michigan. On December 27, 2005, at approximately 5:30 a.m., plaintiff was leaving his apartment to go to work when he slipped and fell on a step on the stairway that led to and from his apartment. In his deposition, plaintiff testified that the weather was cold and clear the day of his fall and that it was not snowing or raining. According to plaintiff, it was "pitch black outside" and there was a light on by the apartment door, but the

[1] Plaintiff Kathleen Anderson's claim is for loss of consortium, which is a derivative action. *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 163 n 1; 713 NW2d 717 (2006). Therefore, this opinion refers to Adam Anderson as "plaintiff."

lighting was dull. Plaintiff did not see any snow or ice on the steps or landings and did not feel any snow or ice on the steps or landings. Plaintiff believed that ice on the step caused him to slip and fall because when he and his wife went to the doctor later in the morning the day he fell, he saw the ice on the step where he slipped. As a result of his fall, plaintiff suffered fractures at the T10, T11 and T12 vertebrae and a herniated disc.

Plaintiff filed suit against defendants. Plaintiff's first amended complaint contained three counts. The first count was a negligence claim. The second count was a claim that defendants violated their statutory duties under MCL 554.139(1)(a) and (b) to keep the premises and common areas fit for the use intended by the parties and to keep the premises in reasonable repair. The third count was a loss of consortium claim on behalf of plaintiff's wife.

Defendants moved for summary disposition under MCR 2.116(C)(8) and (10), arguing that plaintiff could not establish proximate cause because he failed to establish the presence of any ice on the step on which he allegedly slipped and fell. In addition, defendants argued that summary disposition was proper because plaintiff did not establish that defendants had notice of any ice on the step or that defendants should have known of the existence of any unsafe condition on the steps. Finally, defendants argued that plaintiff's claim under MCL 554.139 should be dismissed because there was no evidence regarding the presence of ice on the step at the time plaintiff slipped and fell.

Plaintiff argued that there was ample evidence that his fall was caused by the presence of ice on the step. He further argued that defendants were on notice of the potential for ice build-up on the steps because they regularly checked the weather on the internet, and the forecast called for temperatures both above and below freezing on the day of plaintiff's fall. Thus, plaintiff argued, defendants should have anticipated the build-up of ice during the early morning hours of December 27, 2005.

The trial court granted defendants' motion for summary disposition of plaintiff's negligence claim, but denied summary disposition of plaintiff's claim for violation of MCL 554.139(1) and plaintiff's wife's loss of consortium claim:

> Okay. What the court is going to do is grant the motion as to count I and deny it as to counts II and III based upon the recent case from the Court of Appeals, *Royce v Chatwell Club Apartments*[, 276 Mich App 389; 740 NW2d 547 (2007).] Summary disposition is denied as to counts II and III. When reviewing the evidence submitted in the light most favorable to the non-moving party there is a sufficient basis to permit a reasonable juror to determine that defendants had constructive knowledge of the hazard. So common law negligence is out. Thank you.

The trial court denied defendants' motion for reconsideration, stating:

> In the case at bar, Defendants argue the action should be dismissed as Plaintiff failed to demonstrate proximate cause. The Court finds Plaintiff Adam Anderson's testimony, when viewed in the light most favorable to the non-moving party, is sufficient to permit a reasonable juror to return a verdict in his favor. As to Defendants' argument regarding lack of notice, there is sufficient

> evidence presented to permit a reasonable juror to return a verdict in favor of Plaintiff. Therefore, the motion for reconsideration is denied.

Defendants filed a second motion for summary disposition, seeking dismissal of plaintiff's violation of MCL 554.139(1) claim and plaintiff's wife's loss of consortium claim pursuant to MCR 2.116(C)(10). Defendants argued that defendants Saddle Creek Apartments, LLC, and Beztak Management Company, Inc., should be dismissed from the action because under *Allison v AEW Capital Mgt, LLP*, 481 Mich 419; 751 NW2d 8 (2008), a cause of action under MCL 554.139 arises out of a contractual relationship between a landlord and a tenant, and a cause of action for violation of the statute could not be maintained against non-parties to the lease agreement. Defendants also argued that summary disposition was appropriate as to defendant Saddle Creek Associates, LP, because the stairs at issue constituted a common area and they were fit for the use intended by the parties under MCL 554.139 because under *Allison*, common areas do not have to be absolutely free of snow and ice. Further, defendants contended that summary disposition of plaintiff's claim under MCL 554.139(1)(b) was proper because *Allison* held that the duty to repair under MCL 554.139(1)(b) does not apply to common areas and the accumulation of snow and ice is not a defect; thus, defendants had no duty under MCL 554.139(1)(b) with regard to the natural accumulation of snow and ice.

Plaintiff argued that defendants Saddle Creek Apartments, LLC, and Beztak Management Company, Inc., should not be dismissed from the action because there was an agency/principal relationship between them and defendant Saddle Creek Associates, LP, and they were vicariously liable for any negligence of Saddle Creek Associates, LP. According to plaintiff, it was irrelevant that Saddle Creek Apartments, LLC, and Beztak Management Company, Inc., were not parties to the lease agreement. Plaintiff also argued that the stairs were a common area that were not fit for the use intended by the parties under MCL 554.139(1) because of the ice on the step and because the stairs were plaintiff's only means of accessing his apartment.

The trial court granted defendants' second motion for summary disposition. On the record at the motion hearing, the trial court explained its reasons for granting summary disposition, which were different for the various defendants. The trial court granted summary disposition in favor of defendants Saddle Creek Apartments, LLC, and Beztak Management Company, Inc., because they were not parties to the lease. The trial court articulated the following reasons for granting summary disposition in favor of defendant Saddle Creek Associates, LP:

> As to defendant, Saddle Creek Associates, there is an apparent conflict between the Court of Appeals and the Supreme Court decisions cited by the parties. Neither case is directly on point. The *Benton* case involves a slip and fall on steps but pre-dates *Allison*. On the other hand, *Allison* involves a slip and fall in a parking lot but does not address stairs.
>
> Given this, the Court has decided to grant summary disposition in that case as to Saddle Creek Associates and you'll have a clean appeal. Granted.

The trial court later denied plaintiff's motion for reconsideration, stating:

> In the case at bar, Plaintiffs argue the Court misapplied *Allison v AEW Capital Management Co, LLP*, 481 Mich 419 (2008), and *Benton v Dart Properties, Inc*, 270 Mich App 437 (2006). However, this Court disagrees, and finds the cases are compatible and the ruling conforms to both matters. Thus, the motion is denied as Plaintiffs have failed to demonstrate palpable error as required by the Michigan Court Rules.

II. ANALYSIS

1. STANDARD OF REVIEW

This Court's review of a trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) is as follows:

> A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). *Downey*, *supra* at 626; MCR 2.116(G)(5). When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court "must consider the documentary evidence presented to the trial court 'in the light most favorable to the nonmoving party.'" *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001), quoting *Harts v Farmers Ins Exchange*, 461 Mich 1, 5; 597 NW2d 47 (1999). A trial court has properly granted a motion for summary disposition under MCR 2.116(C)(10) "if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). [*Clerc v Chippewa Co War Mem Hosp*, 267 Mich App 597, 601; 705 NW2d 703 (2005), remanded in part 477 Mich 1067 (2007).]

2. PLAINTIFF'S APPEAL

Plaintiff argues that the trial court erred in granting defendants' motion for summary disposition of plaintiff's negligence claim based on the open and obvious danger doctrine.

Defendants moved for summary disposition under MCR 2.116(C)(8) and (10). The trial court did not articulate under which subrule it found summary disposition appropriate. However, because the parties attached documentary evidence to their briefs regarding this motion, and the trial court's statements on the record reveal that the trial court considered such evidence in rendering its decision, this Court will treat and review the motion as being granted under MCR 2.116(C)(10). *The Detroit News, Inc v Policemen & Firemen Retirement Sys of Detroit*, 252 Mich App 59, 66; 651 NW2d 127 (2002).

The basis for the trial court's ruling is somewhat confusing. It appears that the trial court granted summary disposition of plaintiff's negligence claim based on the open and obvious danger doctrine even though the basis for defendants' motion for summary disposition was

plaintiff's inability to establish proximate cause and notice, not that any danger posed by ice on the steps was open and obvious. We need not determine whether the trial court granted summary disposition based on the open and obvious danger doctrine or whether summary disposition on that basis was proper because we find that summary disposition was properly granted based on plaintiff's inability to establish a genuine issue of material fact regarding whether defendants were on notice of the existence of ice on the step in question. This Court will affirm a decision of a trial court where the trial court reached the right result, even if for the wrong reason.[2] *Coates v Bastian Bros, Inc*, 276 Mich App 498, 508-509; 741 NW2d 539 (2007).

The duty that a landlord owes a plaintiff depends on the plaintiff's status on the land. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). As a tenant of defendants' apartment complex, plaintiff was an invitee. *Benton v Dart Properties, Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006). To sustain a premises liability action, a plaintiff, even an invitee, must show that the defendant or its employees caused the unsafe condition or that the defendant knew or should have known of the unsafe condition. *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001); *Hampton v Waste Mgt of Michigan, Inc*, 236 Mich App 598, 603-604; 601 NW2d 172 (1999). Constructive notice can be inferred from evidence that the condition is of such a character or has existed a sufficient length of time that the landowner should have had knowledge of it. See *Clark*, 465 Mich at 419.

In this case, there is simply no evidence that defendants caused the ice on the step that plaintiff fell on or that they had actual knowledge of the existence of ice on the step. Thus, the question is whether there is a genuine issue of material fact regarding whether, assuming that there was ice on the step, the icy condition was of such a character or existed a sufficient length of time that defendants should have had knowledge of it. *Id.*

Plaintiff presented evidence of two possible sources of the ice on the step. The first possible source of the ice on the step was winter weather conditions. In this regard, plaintiff presented evidence that the weather for December 27, 2005, forecasted temperatures both above and below the freezing mark. According to plaintiff, because defendants routinely checked the weather forecast during the evening and would have been aware of the fluctuating temperatures, they would have been on notice of the potential that snow and ice could melt and re-freeze, resulting in icy conditions when the temperature dropped during the evening hours.

In *Bloss v Sun Communities Operating Ltd Partnership*, unpublished opinion per curiam of the Court of Appeals, issued April 20, 2006 (Docket No. 266602), this Court rejected the argument that weather temperatures fluctuating above and below freezing put the defendant premises owner on notice of icy conditions. The plaintiff in *Bloss* asserted that the defendant had notice of black ice because of fluctuations in temperature above and below the freezing point. This Court rejected the argument, stating:

---

[2] We express no opinion regarding whether summary disposition of plaintiff's negligence claim was proper based on the open and obvious danger doctrine.

> Plaintiffs' meteorologist's data and theory concerning precipitation and temperatures stands as plaintiffs' sole basis for asserting that defendant was obliged to discover and alleviate icy conditions. We decline, under the specific circumstances of this case, to impose a duty on defendant to inspect for ice in response to the fluctuations in temperature above and below the freezing point, without any other indicia of the existence of a potentially hazardous condition.
>
> We conclude that the evidence suggests only that plaintiff was the victim not of defendant's negligence, but of a combination of innocent circumstances, which brought a patch of ice into existence, where none would normally be expected. Defendant's duty to inspect did not extend to checking the roadways for ice through the night and early morning during a period that was without precipitation, simply because some hours earlier the temperature shifted from just at, to again below, freezing. Accordingly, the trial court correctly held that the evidence did not show that defendant had sufficient notice of the hazardous condition to trigger a duty to diminish that hazard. . . . [*Bloss*, unpub op at 2.]

Because *Bloss* is unpublished, the opinion "is not precedentially binding under the rule of stare decisis." MCR 7.215(C)(1). However, the case is on point because the plaintiff in *Bloss* made a nearly identical argument as plaintiff in the present case did regarding a landowner's duty when the landowner is aware that temperatures will fluctuate above and below freezing, thus creating the potential for melting and re-freezing. We conclude that the reasoning and conclusions in *Bloss* are persuasive and apply to the instant case. In this case, there was evidence that in the winter months defendants conducted daily inspections for ice and snow and always checked the weather forecast in the evening. If the evening forecast indicated that ice could build up over night, defendants would apply salt before leaving for the evening. Plaintiff himself testified as to the absence of precipitation on the day of his fall. In the absence of any other indication of the existence of an ice hazard on the steps, defendants' duty to inspect did not extend to checking the premises throughout the night and into the early morning hours simply because the weather forecasted temperatures both above and below freezing.

Plaintiff testified regarding the second possible source of ice on the step on which he fell. Plaintiff testified that during the summer, water would flow down the steps "like a waterfall" and sometimes pool on the landings of the stairway. According to plaintiff, the water "would leak a little bit from the piping [gutter] on the top [of the apartment building]. And then the rain, it'd just soak everything up here . . . and you could just kind of watch the water run down . . . ." However, plaintiff did not notice any water flowing down the steps the morning he fell, and the last time he saw such water was "probably in the fall . . . ." He further admitted that he never saw the water flowing from the building turn into ice. Plaintiff's theory of how the ice formed is speculative at best, considering the last time he observed water flowing down the steps was in the fall, and he fell in late December. A party opposing a motion for summary disposition must present more than conjecture and speculation to satisfy its burden of showing that a genuine issue of material fact exists. *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001).

More importantly, from a notice perspective, there is no evidence that defendants were aware of any problems with the gutters on plaintiff's apartment building. Plaintiff admitted that he never reported the problem with the gutter and the water running down the steps to anyone at

the apartment complex. Furthermore, Dawn Riecher, defendants' property manager, testified that she never received any complaints regarding ice or snow on the stairway in question and that she never received any complaints or maintenance requests regarding problems with the gutters on plaintiff's building. In addition, Andrew Koziol, who worked for defendants as a leasing professional in December 2005, testified that he never took any complaints, phone calls or messages regarding problems with the gutters in plaintiff's building and that he did not receive complaints, phone calls or messages regarding ice or snow at plaintiff's building. In the absence of any evidence that defendants had been informed of any condition involving the gutters and water flowing down the steps, there is no issue of material fact regarding whether defendants should have been on notice of the existence of ice on the step.

Furthermore, regardless of the source of the ice (i.e. fluctuating temperatures causing melting and re-freezing or a gutter problem with plaintiff's building), plaintiff failed to establish that the condition on the step lasted for a sufficient length of time that defendants should have known about it. *Clark*, 465 Mich at 419. Plaintiff testified that when he walked on the steps the day before he slipped and fell, he did not observe any ice on the stairs. In addition, both plaintiff and his wife testified that they did not know how long the ice had been on the step. Finally, plaintiff admitted that the ice could have formed at some time after he fell. In the absence of any evidence that the ice had existed on the step for a considerable time, summary disposition was proper. See *Whitmore v Sears, Roebuck & Co*, 89 Mich App 3, 8; 279 NW2d 318 (1979). Therefore, because plaintiff failed to create a genuine issue of material fact regarding whether defendants had actual or constructive notice of the presence of ice on the step in question, he cannot maintain his negligence claim against defendant, and the trial court properly granted defendants' motion for summary disposition.

Plaintiff next argues that the trial court erred in dismissing plaintiff's violation of MCL 554.139(1) claim based on *Allison*. MCL 554.139 provides, in relevant part:

> (1) In every lease or license of residential premises, the lessor or licensor covenants:
>
> (a) That the premises and all common areas are fit for the use intended by the parties.
>
> (b) To keep the premises in reasonable repair during the term of the lease or license, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located, except when the disrepair or violation of the applicable health or safety laws has been caused by the tenants [sic] wilful or irresponsible conduct or lack of conduct.

We need not determine whether summary disposition was proper based on *Allison* because plaintiff's failure to establish an issue of fact regarding whether defendants had notice of the existence of any ice on the step on which plaintiff fell is also fatal to plaintiff's claim that defendants violated MCL 554.139(1). See *Royce*, 276 Mich App at 399-400.

Dismissal of plaintiff's wife's loss of consortium claim was also proper. Plaintiff's only other claims against defendants were his negligence claim and violation of MCL 554.139(1) claim. Because these primary claims were both properly dismissed based on plaintiff's failure to

establish a genuine issue of material fact regarding whether defendants had notice of the existence of ice on the step on which plaintiff slipped and fell, plaintiff's wife's loss of consortium claim, which is derivative of plaintiff's negligence and MCL 554.139(1) claims, must fail as well. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 461; 683 NW2d 587 (2004); *Long v Chelsea Community Hosp*, 219 Mich App 578, 589; 557 NW2d 157 (1996) ("A derivative claim for loss of consortium stands or falls with the primary claims in the complaint.").

Based on our conclusion that plaintiff's failure to establish a genuine issue of material fact regarding whether defendants had notice of the existence of ice on the step on which plaintiff slipped and fell, we need not address plaintiff's remaining arguments on appeal.

2. DEFENDANTS' CROSS-APPEAL

Defendants argue that the trial court erred in denying their motions in limine regarding the admission of certain evidence at trial. Because the trial court properly granted summary disposition of all of plaintiff's claims, thus eliminating the need for a trial, we need not address these issues on appeal.

Affirmed. Defendants, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Stephen L. Borrello
/s/ Jane E. Markey
/s/ Cynthia Diane Stephens